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KETUA PENGARAH PERTUBUHAN KESELAMATAN SOSIAL

v.

B

THAM TIAN SIONG

HIGH COURT SABAH & SARAWAK, SIBU
HAMID SULTAN ABU BACKER JC
[CIVIL APPEAL NO: 11-5-2006]
13 NOVEMBER 2007

C

LABOUR LAW: *Social security - Accidents while traveling - Employee traveling from workplace to home - Whether commuting accident within s. 24(1)(a) and (b) of the Employees Social Security Act 1969 - Whether such commuting fell within the phrase 'connected' - Whether* D *tribunal had taken into account irrelevant considerations or misconstrued terms of relevant statute - Whether there were substantial questions of law to justify hearing of appeal*

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This was the appellant's appeal against the decision of the Chairman of the Social Security Appellate Body pursuant to r. 17 of Employees' Social Security (Social Security Appellate Board Procedure) Regulations 1976 (SSR 1976). Briefly, the respondent was a mechanic and was employed by Jaya Tiasa Plywood Sdn Bhd. On 19 December 2003, at 3am, the respondent was traveling F with his other colleagues to the wharf from the log pond, his place of work to Kapit then to Sibu and onwards to his home but unfortunately, the land cruiser in which the respondent was traveling went out of control and plunged into a ravine ('the commuting accident') which was within s. 24(1)(a) of the G Employees Social Security Act 1969 (ESSA 1969) *ie*, traveling on a route between his place of work and place of residence.' Further, the respondent said that the respondent's commuting accident also fell within s. 24(1)(b) of the ESSA 1969 *ie*, 'travelling on a journey made for any reason which is directly H connected to his employment'. The respondent submitted a statement to the appellant for the purpose of processing his claim which was confirmed by the employer. The appellant herein contended, *inter alia*, that the grounds which the chairman relied on to find that the journey was one made for a reason which was I directly connected to his employment were erroneous in the law and on the evidence. Further, the appellant argued the chairman

had erred when he held that it was reasonable for the respondent to expect to be covered by the ESSA 1969 by virtue of their contribution to the appellant's social security scheme. A

Held (dismissing appellants' appeal):

B

(1) ESSA 1969 is primarily aimed to protect employees and among others to provide with benefits within their scheme of insurance. It is a social legislation. Social legislation must be liberally construed and in almost all cases the court is likely to lean in favour of the beneficiary provided it does not violate any provisions of the Act. (para 8) C

(2) The board had diligently deliberated on the issues and made a finding that the respondent was traveling on a journey which was directly connected to his employment. The board had rightly construed the phrase 'directly connected' and such construction could not be reasonably faulted. Parliament would never have intended for an employee not to be protected under the scheme when the respondent was under employment and 'which is directly connected to his employment.' It was abhorrent to notions of justice and fair play for the appellant, a statutory body to sought strict interpretation of social legislation and attempt to defeat the legitimate expectation of the public and in particular employees. (para 8) D E F

(3) It is incumbent upon an employee to travel from his home to the workplace and from the workplace to his home. Such commuting would fall within the phrase 'connected'. During such commuting, some deviation to have a cup of tea or to buy some grocery or to stop at a friend's house does not necessarily mean that it was not directly connected to the employment. (para 9) G

(4) Where there is a dispute, it is for the board to make a finding. It would be sufficient for the appellant when challenging the decision of a tribunal to satisfy the court that the tribunal has dealt with the wrong questions or has taken into account irrelevant considerations or has misconstrued the terms of any relevant statue, or has misapplied or misstated a principle of the general law. However, SSR 1967 places a higher burden H I

A on the appellant in that he must satisfy the court at the commencement of the proceedings that it involves substantial question of law to justify the hearing of the appeal. (para 9)

Case(s) referred to:

B *Ketua Pengarah Pertubuhan Keselamatan Sosial v. Mohd Zaili Ali [2003] 4 CLJ 165 HC* ***(refd)***

Ketua Pengarah Pertubuhan Keselamatan Sosial v. Rajaparameswari Marimuthu [2004] 4 CLJ 528 HC ***(refd)***

Syarikat Kenderaan Malayu Kelantan Bhd v. Transport Workers' Union [1995] 2 CLJ 748 CA ***(refd)***

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Legislation referred to:

Employee's Social Security (Social Security Appellate Board Procedure) Regulations 1976, r. 17

Employees Social Security Act 1969, s. 24(1)(a), (b)

D *For the appellant - Adrian Chew; M/s Battenberg & Talma Advocates*

For the respondent - Esther Wong; M/s Wong, Orlando Chua & Kuok Advocates

Reported by Suhainah Wahiduddin

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JUDGMENT

Hamid Sultan Abu Backer JC:

F **[1]** This is my judgment in respect of appellant's appeal against the decision dated 29 March 2006 of the chairman of the Social Security Appellate Body.

[2] The appeal is filed pursuant to r. 17 of Employee's Social Security (Social Security Appellate Board Procedure) Regulations G 1976 (SSR 1976) to be read with Civil Appeal Rules. The said Rules state as follows:

(1) There shall be no appeal to the High Court from an order of the Board unless the order involves a substantial question of law.

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(2) The notice of appeal shall be filed with the Board in Form I within sixty days from the day on which the order was made.

I (3) Subject to paragraph (2) of this regulation:

(a) in the case of West Malaysia the provisions of Order XXXIX of the Subordinate Court Rules, 1950, and

(b) in the case of East Malaysia the provisions of the Magistrates' Courts (Civil Appeals) Rules

shall apply, with such modifications as may be necessary, to an appeal from the order of the Board to the High Court.

[3] Very importantly the rule says there can be no appeal to the High Court unless it involves a substantial question of law. At the commencement of the proceedings both parties agreed that the issue of law to be determined is in relation to s. 24(1)(b) of Employees Social Security Act 1969 (ESSA 1969). Section 24 of ESSA 1969 reads as follows:

Section 24. Accidents while traveling.

(1) An accident happening to an insured person shall be deemed to arise out of and in the course of his employment if the accident happens while the insured person:

(a) is traveling on a route between his place of residence or stay and his place of work;

(b) is traveling on a journey made for any reason which is directly connected to his employment; or

(c) is traveling on a journey between his place of work and the place where he takes his meal during authorized recess.

(2) If the accident under subsection (1) occurs during any interruption of, or deviation from, the insured person's journey made for any of the purposes stipulated in the same subsection, the accident shall not be deemed to arise out of and in the course of his employment.

In this case the memorandum of appeal filed by the appellant did not frame the issue of law as required by the Act. I take the view that this is a material non-compliance which warrants the appeal to be dismissed. However, the wider interest of justice demands that technical non-compliance of the rules must be disregarded and the matter must be heard to uphold substantive justice unless the respondent can demonstrate that the non-compliance is of a nature which cannot be rectified or amended or may cause substantive prejudice which cannot be compensated by costs.

[4] By consent of the parties at the hearing of the application the issue of law was framed as follows:

> Is the respondent who was on leave from work and during the time on leave and if he gets into an accident and is injured – Does it fall as an injury in the course of employment as stated in section 24(1)(b) of ESSA 1969?

Brief Facts

[5] The respondent was a mechanic and employed by Jaya Tiasa Plywood Sdn. Bhd. On 19 December 2002 at about 3am, the respondent was travelling with his other colleagues to the wharf from the log pond, his place of work to Kapit then to Sibu and onwards to his home but unfortunately, the land cruiser in which the respondent was traveling went out of control and plunged into a ravine (hereinafter referred to as "the commuting accident"). The statement of the respondent dated 31 March 2003 to the appellant for the purpose of processing his claim sets out the facts leading to the accident. The contents of the letter reads as follows:

> Saya adalah seorang pekerja kepada Jaya Tiasa Plywood Sdn. Bhd. Tugas saya ialah sebagai pemandu landcruiser dan menghantar pekerja pergi dan balik bekerja. Saya biasanya menghantar pekerja dari base camp ke wharf dan sebaliknya. Tempat kerja saya ialah di Putai Camp Kapit.
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> Waktu kerja saya ialah dari 7:00 a.m. – 5:30 p.m. Hari bekerja saya ialah tiap-tiap hari, namun dalam sebulan ada diberi 5 hari cuti. Saya mengesahkan pada 19.12.2002 ada turun bekerja untuk menghantar pekerja-pekerja berikut ke wharf. Mereka ialah:
>
> 1. Avitus bin Ambin @ Ambun
> 2. Tham Tian Man
> 3. Tham Tian Siong
> 4. Lo Ing Seng (meninggal dunia)
>
> Selain daripada mereka yang dinyatakan di atas, terdapat 3 orang pekerja dari Pansar Sarawak Sdn. Bhd. Menumpang landcruiser saya. Kami memulakan perjalanan dari Base camp kira-kira jam 1.00 a.m. Permulaan perjalanan dimulakan seawal itu adalah kerana ia perlu mengambil masa lebih kurang 2 jam untuk sampai di wharf. Mereka hendak menaiki bot ekspress jam 4:30 a.m. untuk pergi ke Kapit. Manakala bot ekspress dari Kapit ke Sibu bermula pada jam 8:00 a.m. Setahu saya, kesemua pekerja yang dihantar oleh saya pada hari itu hendak balik Sibu.

Semasa dalam perjalanan pergi ke wharf, kami telah mengalami kemalangan di k.m. 13 dari wharf Putai. Landcruiser yang dipandu oleh saya hilang kawalan secara tiba-tiba dan terjatuh ke dalam cerung. Punca kejadian mungkin disebabkan cuaca yang hujan dan berembun, lagipun jalan agak licin.

Saya mengesahkan kesemua kami ada mengalami kecederaan.

Saya sendiri telah cedera di tangan kanan dan kedua-dua kaki.

Kemalangan telah berlaku kira-kira jam 3.00 a.m.

Sekian sahaja pengakuan saya.

This is further confirmed by the employer by a letter dated 28 June 2004 to the appellant.

With reference to your letter dated 03.06.2004 regarding the above-captioned.

We wish to inform you that our company did provide quarters for the above injured workman at Putai, Kapit (our factory is located at the interior of the forest). On 18.12.2004, the injured workman finished his duty at 1900 p.m.

The daily working hours are normally from 0700 a.m. to 1900 p.m. at our site factory. Our employees stationed at Putai, factory, will take their rest days after completion of one calendar month of working. They normally return to their respective homes, by boarding the only available express to Kapit and then to other towns as there is no other transportation available immediate after work.

The journey usually starts on the following day in the early morning at 2.00 a.m. from our factory to the destined logpond, to catch the only Express at around 04:00 a.m. This commuting journey has been practiced since the factory was built more than ten years. Mr. Tham Thain Siong was on the commuting accident back to Sibu on that ill-fated day on 19.12.2003.

We strongly belief that the above incident is classified as commuting accident. Looking forward to receiving your settlement soon.

Thank you.

Yours faithfully,
for Jaya Tiasa Plywood Sdn. Bhd (166980-K)

Vincent Sia Chik Foo
Human Resource And Administration Manager

The contents of the statement and the letter were not disputed before the board. The relevant part of the boards finding reads as follows:

> ... the appellant finished his work before embarking on the fateful journey on 18.12.2002. Further it is disclosed by the statement of the employer's representative who is the driver of the land cruiser at time of the commuting accident that land cruiser belongs to the employer. The insured person was traveling in that land cruiser at the time of commuting accident with his other colleagues. His purpose of travel is to go back to his home as he had obtained leave from his employer. Prior to the travel the insured person has finished his work for the day on 18.12.2002 at 7.00 p.m. and had started his journey after that from the log pond, his work place, on his employer's land cruiser on 19.12.2002. The time was about 2.00 a.m.
>
> The Board has taken the following salient features into consideration before arriving at a decision to allow the claim for social security by the appellant. They are as follows:
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> – the insured person was allowed leave by his employer to be back home;
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> – the insured person has to travel to Kapit in order to obtain an onward transport to Sibu before he embarks on his journey home;
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> – the insured person was traveling on a vehicle provided by the employer;
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> – A log pond is a place where the logs are piled together. It is a place where the royalty marking usually done. It can be within or outside the licensed area. In the present case the insured person has not left the log pond yet when the accident took place;
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> – the leave granted by the employer is a privilege afforded to the insured person and it is incidental to the insured person's employment;
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> – *Albeit* the insured person being on leave on the fateful day but he is yet to leave the work area in order to enjoy his leave;
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> – The work area or work place in which the insured person is employed is not the best of all places for him to travel safely and freely without any hitches during the journey. It is purportedly undulating and only four wheel drives are

accessible to and from such areas like a land cruiser. Further the insured person cannot be expected to ply the route with other forms of transport other than the one provided by the employer. Thus his transportation in and out of his work place ie, the log pond has to be with the transportation provided by his employer;

– The weather at the material time was bad as it was raining, misty and the ground was wet which further contributed to the accident;

– The fateful event of the accident cannot be isolated but has to be viewed as a series of events from the time the appellant left his place of stay (the quarters) and on to the land cruiser which is sufficient to constitute a commuting accident if reasonably viewed together;

– In order to be successful in his social security claim the appellant need not be injured during actual working time. Even normal break times may count to his advantage. He must be allowed a reasonable period before and after working hours before he actually ceases to be in the course of employment. In the present case at hand it would be safe to conclude that he only ceases to be in employment when he is already at home with his loved ones back home but till then he is still in the course of employment. Moreover he has not left his place of work that is the log pond to start his leave;

– The leave taken is not something which the appellant is contractually disbarred from pursuing. It can be reasonably said to be incidental to his actual work, hence he is still in the course of employment at the time of commuting accident;

– Circumstance of this nature ought to be taken into account by SOCSO before rejecting any claim by insured person. It is only befitting for the insured person in that position to expect to be covered by such mishaps when they contribute to SOCSO.

[6] The appellant complains that the learned chairman erred on the law and fact by deciding that the respondent's "commuting accident" on 19 December 2002 arose out of and in the course of his employment because the journey was made for a reason which was directly connected to his employment. Further, the appellant says the following grounds stated below which the

learned chairman relied on to find that the journey was one made for a reason which was directly connected to his employment are erroneous in the law and on the evidence. They are as follows:

> At the material time, the Respondent was on leave with the permission of his employer. The leave was a privilege afforded to the Respondent to which he was not disbarred from pursuing and was therefore reasonably incidental to his employment. The journey was necessary as there was no other route available to the Respondent. The Respondent was traveling in a vehicle provided by his employer. There was no other mode of transportation to ply the route taken by the Respondent other than the vehicle provided by his employer. The leave was one which would be beneficial to the employer as the Respondent would return to work feeling refreshed and energized therefore increase his productivity at work. The journey begun at the Respondent's work place. The Respondent was assumed to be going on paid leave and would return to resume his duties after his leave. By virtue of the fact that the Respondent had yet to reach home and be with his loved ones.

In addition the appellant says that the learned chairman erred in the law and on the evidence when he held that a reasonable period must be allowed before and after work hours before it can be said that the respondent ceases to be in the course of employment. As a last ground the appellant says the learned chairman further erred in the law and on the evidence when he held that it was reasonable for the respondent to expect to be covered by the ESSA 1969 by virtue of their contribution to the appellant's social security scheme.

[7] The respondent on the facts says that:

> The Respondent is stationed at his employer's factory in Putai (which is located at the interior of the forest). The purpose of the Respondent's travel on 19.12.2002 was to go back to his home as he had obtained leave from his employer. In order to go back to his home, the respondent has to travel from the factory to the log pond using his employer's land cruiser and then boards the only available express from the log pond at around 4 a.m. to Kapit's wharf. The Respondent's leave to go back to his home was approved by his employer and is part of the benefit of the respondent's employment with his employer.

Further, the respondent states that at the material time the respondent was traveling from the logpond to the Putai's wharf in his company's land cruiser driven by his colleague to catch the only available express to go Kapit and thereafter to go back to his home (in other town). In other words, the respondent was yet to leave his work area when the accident took place. In addition the respondent says it is evident in the respondent's employer's letter that the company did provide quarters for the employees and after completion of one calendar month of working, the employees will take their rest days and return to their respective homes. Hence, it is clear that the company's quarters is a "temporary or short-term" kind of residency for the respondent to stay while working in his employer's factory (situated at Putai). And on 19 February 2002, the respondent was taking his leave to go back to his home (permanent residence) as he was entitled to in his contract of employment with his employment with his employer." In conclusion the respondent says that the respondent was travelling directly from his work place to catch the express from the Putai's wharf to Kapit and then to his place of residence. However, before the respondent could leave his work place, he met with the "unfortunate accident" and therefore, the accident is clearly within s. 24(1)(a) the ESSA 1969 ie, 'traveling on a route between his place of work and place of residence. Further, and in the alternative, the respondent says that the respondent's commuting accident also falls within s. 24(1)(b) of the ESSA 1969 ie, 'travelling on a journey made for any reason which is directly connected to his employment'.

[8] I have read the appeal record, the memorandum of appeal and the submission of both parties in detail. I take the view the appeal must be dismissed. My reasons are as follows:

(a) It cannot be disputed that ESSA 1969 is primarily aimed to protect employees and among others to provide with benefits within their scheme of Insurance. In essence it is a social legislation. Social legislation must be liberally construed and in almost all cases the court is likely to lean in favour of the beneficiary provided it does not violate any provisions of the Act. Support for the proposition can be found in a number of cases. To name a few which is directly in point are as follows:

(i) In *Ketua Pengarah Pertubuhan Keselamatan Sosial v. Mohd Zaili Ali* [2003] 4 CLJ 165, the court opined:

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[2] Section 24 of the ESSA is amenable to a wide and purposive interpretation. It seeks to provide a liberal insurance coverage in respect of injuries sustained by workers in the course of their employment. For this reason, the exclusionary provisions of s. 24(2) of the ESSA have to be subjected to the purposive construction that they deserve, in line with the economic objective of providing the worker with the widest possible insurance coverage. Such a construction will promote the legislative objective and economic purpose underlying the ESSA.

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[3] A worker who meets with an accident whilst going to or returning from work should be able to claim under s. 24 of the ESSA even if he has deviated from his journey – if the ultimate objective of his travel is to reach his workplace or residence-provided the deviation or detour is not made in furtherance of some other economic pursuit distinct from and unrelated to the obligations under his contract of employment.

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(ii) In *Ketua Pengarah Pertubuhan Keselamatan Sosial v. Rajaparameswari Marimuthu* [2004] 4 CLJ 528 the respondent met with an accident when she was on her way to go to the bus station to catch his employer's factory bus to go to a factory from her daughter's house in Bukit Dumbar. It was in evidence that the respondent's residential address was recorded as "Taman Tun Sardon, Gelugor" and the respondent did testify that every weekend, she would stay overnight at her daughter's place and then leave to work on Monday morning. The court opined that "on the facts of his case when the insured left her daughter's house, she was in fact traveling on a route between her place of 'stay': and her place of work, that is to the bus station where she would be picked by the factory bus'. Further, the court took the view that the respondent in the said case was enrouted directly from the place of stay to the place of work." The court on the facts held:

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[1] The determination of the instant appeal turned on the true construction of s. 24(1)(a) of the Act, in particular the phrase "place of residence or stay". Although the word "residence" carries with a degree of permanency in dwelling, the word "stay" does not. On the contrary, the words `place of stay' connote a temporary or short-term or an impermanent kind of residency.

I

[1a] The words "residence" and "stay" in the phrase "place of residence or stay" must be read disjunctively. Parliament could not have intended the word "stay" to have the same meaning as the word "residence". A

[1b] Consequently, when the respondent commuted from her daughter's house in Bukit Dumbar to the bus station, on the morning of 10 January 2002, she was, for the purposes of s. 24(1)(a) of the Act, 'travelling on a route between her place of stay and her place of work'. An "employment injury" within the meaning of s. 2(6) of the Act had indeed been sustained. B C

(b) From the reading of the two cases the test to be applied to determine whether the accident attracts s. 24(1)(b) is that to find out what is the primary purpose of the employees movement or travel – Is it work related or is it one where the accident would not have happened if he was not in employment (all things being equal) are some of the factors which need to be considered and need not be the only factors. In this case the Board has diligently deliberated on the issues and made a finding that the respondent was travelling on a journey which is directly connected to his employment. The learned authors of Chambers Thesaurus (Reprint 1995) define connected to mean affiliated, akin, allied, associate, associated, bracketed, combined, confederate, coupled, joined, linked, related, unite. And the word incidental is defined to mean accompanying, ancillary, attendant, casual, chance, concomitant, contingent, contributory, fortuitous, incident, inconsequential, inessential, irrelevant, minor, non-essential, occasional, odd, random, related, secondary, subordinate, subsidiary. It will appear the word connected necessarily means such words like "incidental" etc which the court is entitled to construe as liberally as possible in favour of the employee. Even if it is a wrong choice of words that alone cannot be a basis of complaint unless such word is totally different in meaning. In this case the Board has rightly construed the phrase "directly connected" and such construction cannot be reasonably faulted. Parliament will never have intended for an employee not to be protected under the scheme when the respondent was under employment and "which is directly connected to his employment." It is abhorrent to notions of justice and fair D E F G H I

play for the appellant, a statutory body to sought strict interpretation of social legislation and attempt to defeat the legitimate expectation of the public and in particular the employees.

[9] It is incumbent upon an employee to travel from his home to the work place and from the work place to his home. It is my judgment that such commuting will fall within the phrase "connected". During such commuting some deviation to have a cup of tea or to buy some grocery or to stop at a friend's house does not necessarily mean that it is not directly connected to the employment. It all depends on the facts. And where there is a dispute it is for the board to make a finding. I do not think that such facts which has to be determined by the board can ordinarily be a subject matter of an appeal, by the appellant though any decision of the board can be questioned by the respondent provided it can satisfy the criteria set out in r. 17 of SSR 1976. As a general rule it will be sufficient for the appellant when challenging the decision of a tribunal to satisfy the court that the tribunal has dealt with the wrong questions or has taken into account irrelevant considerations or has misconstrued the terms of any relevant statute, or has misapplied or misstated a principle of the general law. (See *Syarikat Kenderaan Malayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 CLJ 748). However, SSR 1976 places a higher burden on the appellant in that he must satisfy the court at the commencement of the proceedings that it involves substantial question of law to justify the hearing of the appeal.

[10] For reasons stated above, I dismiss the appellants' appeal with costs. The getting up fees shall not exceed RM20,000. If costs cannot be agreed the respondent is at liberty to tax the costs. I hereby order so.